REVIEWS.

Law and Politics in the Middle Ages. By EDWARD JENKS, M.A., Reader in English Law in the University of Oxford. New York, Henry Holt & Co., 1898. — xiii, 352 pp.

Mr. Jenks has not attempted to write, or even to outline, the political and legal history of Europe in the Middle Ages; but he has treated, in a readable and often brilliant fashion, some phases of the movement that interest him and that serve to illustrate his views regarding institutional evolution. His general theory is largely a blend of Maine's idea of progress from status to contract and of Spencer's idea of progress from the military to the industrial state; but the combination of these ideas, and the modifications necessitated by fuller knowledge of early institutions, have produced a theory that is distinct from Maine's or Spencer's.

The author does not start, as did Maine, with the household. He treats the question of the earliest relation between household and clan as "one which the present state of our knowledge does not enable us to answer" (p. 161); he does not notice the evidence that has recently been gathered to show the early predominance of the clan in many matters that are afterwards household affairs, like marriage, guardianship and inheritance; he even asserts that the clan organization "stopped short at the household" (p. 77) — but he starts with the clan. To this organization he denies the name of state. The state arises with the combination of clans under military leadership. The first state, at least in the Teutonic world, is the military state. Of this state the *heretoch* or host-leader becomes king. This military state is no outgrowth of the clan. The two organizations are based on different principles. The leadership of the clan, like its whole organization, is determined by descent; while kingship, at the outset, is not hereditary, and the bond of the state is not common blood, but common subjection to the same authority. The economic system of the clan is more or less communistic, and when it settles its agricultural system is common tillage of plough-land and common use of pasture and forest; while the military state encourages allotments in severalty. The Teutonic kings, by settling their military followers on allotments

of royal land (benefices) and investing them with local jurisdiction, develop the manorial system, in which the seigneur ultimately takes the place of the older communal authorities.

The changes effected by the military state in the development of law are so radical that it is almost permissible to say that law, as we understand it, begins with the military state. Clan law is purely customary, and its sanctions are religious. The clansmen have developed certain habits. A community with similar habits will naturally resent any deviation from habit on the part of any of its members. It is a natural assumption that the Unseen Powers, of whom man lives in terror and whom he seeks to propitiate, view the deviation with equal dislike. There are facts, too, to support the assumption. It is through disasters that divine anger manifests itself, and disasters frequently attend deviations from the customary course. To avert the wrath of the gods from the community the breaker of custom is accordingly sacrificed or driven into the wilderness (pp. 56, 57, 296 *et seq.*). This simple and highly conservative law is not sufficient for the state. The union of clans itself raises new problems and necessitates the development of new law. The feuds through which inter-clan offenses are avenged are detrimental to the state. The state, accordingly, first regulates feuds by limiting participation on either side to the narrower circle of kinsmen, the *Sippe;* then it encourages composition, or the barter of revenge for goods; then it fixes a tariff of compositions and forbids feud. This is the beginning of the process by which the state reaches down into the clan and deals with its members, isolating first the *Sippe*, then the household, and then the individual. This is also the beginning of the tribal court and the making of law by its judgments. These last two points are not clearly brought out; but they are certainly suggested by Mr. Jenks's argument and seem to be involved in it.

The antithesis between state and clan is made by the author to run down through the Middle Ages and to persist even in modern times — a point of view which he obtains by regarding feudal associations, gilds, monasteries and colleges as "gentile" bodies. Over against these he sets, not only the "military" association, which is the state, but also, in one passage (pp. 303, 304), the modern "contractual" associations, such as clubs and voluntary committees. By feudal groups he obviously means manors, since the holders of the higher tenures are component parts of the "military" association which is the state. But it is hard to see why monasteries and colleges are not "contractual" associations, since men regularly become

monks and fellows of their own free will. The idea which underlies his extension of the term "gentile" and his assertion of the persistent antagonism between the state and the "gentile" groups is nowhere clearly formulated. It seems, however, that by "gentile" groups he means those associations that strive to withdraw their members from the control of the state and to establish immunities. This effort the state is, of course, bound to resist.

The successor of the military state, in the author's theory, appears to be the "contractual" state. The precise nature of this state is not indicated. The principle on which it rests, we are told, was first introduced into politics by the formation of the Swiss and Dutch confederacies (p. 308); and this principle received a set-back when the Confederate States of America were crushed by war and their people forced back into the Union (p. 317). Oxford seems still to be the home of lost causes.

Mr. Jenks's law is much better than his politics. Three of the best chapters in the book trace the development, on the continent and in England, of judicial procedure (chapter iii), of the law of property (chapter vi), and of contractual obligation (chapter vii). Here some of the most interesting results of recent research are made accessible to the student and intelligible even to the layman.

Mr. Jenks has worked from original material, and his "List of Principal Sources" and "Synoptic Table of Sources" represent much patient labor that should not remain thankless. He has also made use of much of the best literature. If, however, in addition to Brunner's *Römische und Germanische Urkunde* and his article in Holtzendorff, Mr. Jenks had carefully read Brunner's *Deutsche Rechtsgeschichte*, he would probably have modified some of his statements and would have obtained better illustrations for others.

The author's theory of the nature of law is substantially Austinian — with a qualification. The Austinian theory, he says, is true only of modern law. All through the Middle Ages, as he points out, systems of law were recognized and obeyed which cannot be brought under the Austinian definition. For these he does not try to account. He does not recognize that custom always was, and still is, as good a source of law as statute; nor does he see that the source of law is after all a minor matter as compared with its sanction.

Mr. Jenks's book is interesting throughout and highly suggestive. The latter quality is due largely to the fact that he is thinking at many problems which neither he nor the rest of us have thought out.

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